BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the matter of Petition of Cavalier Telephone LLC Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc and for Arbitration

WC Docket No 02-359

RESPONSE TO OPPOSITION TO PETITION FOR RECONSIDERATION

Cavalier Telephone, LLC ("Cavalier") hereby responds to the Opposition to Cavalier's Petition for Reconsideration in this matter filed by Verizon Virginia, Inc. ("Verizon") on January 22, 2004 ("VZN Opp."). As described below, Verizon's objections to Cavalier's requests for reconsideration are without merit, and Cavalier's requests should be granted.

1. RECONSIDERATION WITH RESPECT TO 4-WIRE CIRCUITS FOR DS-1 SERVICE IS PLAINLY APPROPRIATE BASED ON THE FACTUAL RECORD OF THIS CASE.

Everyone agrees that ***if*** Verizon "routinely" provides 4-wire circuits to its retail customers, then Cavalier gets them too. So the question is evidentiary: what does Verizon actually do? At the hearing, Cavalier presented unrebutted testimony that Verizon routinely provides end-to-end 4-wire circuits to retail customers, but not Cavalier. Rebuttal Testimony of Amy Webb on Behalf of [Cavalier] at 1-2. This is the ***only*** competent testimony on this point.[1]

[1] This testimony is competent because Cavalier learns what Verizon will do at retail by competing with Verizon, and has discovered that Verizon gives its retail customers a better deal than Verizon gives Cavalier at wholesale. This is ***precisely*** the problem that Ms. Webb testified to with respect to providing 4-wire circuits end-to-end for DS-1 service. This testimony is also inherently plausible. The problem with using 2-wire loops for DS-1 service is that they have a higher incidence of maintenance and repair problems. *See* Petition of Cavalier Telephone LLC Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc and for Arbitration, WC Docket No. 02-359, *Memorandum Opinion and Order* (released December 12, 2003) ("*MO&O*") at ¶ 96. It would be totally understandable for Verizon to piously assert that it has the right to provide 2-wire circuits if that's all it

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Verizon neither cross-examined nor presented competent contrary evidence on this issue Verizon's witness Ms Clayton did not have any knowledge about it; indeed, she repeatedly distanced herself from such knowledge, stating that she was not "the product manager for DS-1" services *See* Tr 430, 432 She merely stated — in the conditional tense — that whatever Verizon would do at retail, it would do for Cavalier at wholesale. She never testified to knowledge of what Verizon actually ***did.*** Logically, therefore, this matter should be closed [2]

The Bureau moved in the right direction by requiring Verizon to provide 4-wire loops if it "routinely" does so for retail customers *See MO&O* at ¶ 99. Unfortunately, this does not resolve the issue of 4-wire versus 2-wire loops, it simply sets up the fight for another day, since Cavalier ***already*** believes, and has presented testimony (unrebutted, uncrossed) that Verizon ***already*** "routinely" provides 4-wire loops on request for retail customers.

For these reasons, Verizon's claim — that Cavalier is asking it to provide 4-wire loops "regardless of what network modifications Verizon would have to make" (*see* VZN Opp at 3) — is beside the point. The evidence shows that Verizon will make the necessary "network modifications" (never explained in detail) when asked by its own DS-1 customers. The parties' contract should therefore require Verizon to do so in response to requests from Cavalier.

2. THE ASSURANCE OF PAYMENT LANGUAGE SHOULD BE MUTUAL.

Verizon raises several objections to Cavalier's request that the assurance of payment

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(footnote continued)

wants to do and yet nonetheless quietly accede to requests from knowledgeable customers to actually deploy a 4-wire loop in order to avoid service problems and customer dissatisfaction. There is certainly no basis to discount Ms Webb's testimony on this point.

Verizon tries to attack Ms Webb's testimony by noting that at one point there was some minor confusion on a panel as to which witness was in the best position to explain proposed contract language relating to a different substantive issue *See* VZN Opp at 2 Cavalier readily admits that its witnesses are less legalistic than Verizon's That is all that Verizon has shown, however — not any sort of substantive impeachment of Ms Webb

language be made mutual First, Verizon claims this matter is not properly raised on reconsideration VZN Opp. at 3-6 This is nonsense. Section 1.106(k)(1)(i) of the Commission's rules states that on reconsideration the Bureau may "simultaneously reverse or modify the order from which reconsideration is sought." Given that the Bureau imposed the language that it did, Cavalier seeks to "modify" it to make it mutual. Verizon is free to, and does, oppose this request, but it is entirely proper to raise it on reconsideration.[3]

Establishing ***mutual*** assurance-of-payment rights is not a new "issue." The issue of assurance of payment was plainly teed up and litigated, and Cavalier directly challenged the fact that Verizon proposed unilateral language.[4] Further, the evidence plainly reflected the potentially mutual nature of the remedies *See* Tr. page 331, line 9 through page 332, line 5 (noting that Cavalier had in the past "embargoed" Verizon when Verizon failed to pay its bills) Verizon cannot seriously claim that it is surprised that Cavalier objects to remedies for nonpayment that only flow in one direction. Note also that Verizon does ***not*** deny that it has refused to pay its bills — it just puts its own spin on it. VZN Opp. at 5-6 [5]

As Cavalier pointed out earlier, the Bureau's charge under the Act is to resolve "issues" in dispute not "contract language" in dispute *See* Reply to Verizon's Petition for Reconsideration (filed January 22, 2004) at 1-2 For this reason, the fact that Cavalier did not specifically propose the contract language it seeks on reconsideration is irrelevant This is not a new "issue." It is an aspect of the "issue" that was fully litigated by the parties *See infra*

[4] *See* September 23, 2003 Direct Testimony of David Whitt at p 1, line 19 ("Verizon has not explained why a unilateral deposit obligation should apply"), *see also* October 9, 2003 Rebuttal Testimony of David Whitt at p 8, line 22 through p. 9, l. 2 (pointing out charges billed to Verizon by Cavalier and asserting that "this unilateral aspect of Verizon's proposed language is another indication that the language proposed by Verizon is unfair and unreasonable")

[5] The parties will bill each other for intercarrier compensation, interconnection, and possibly collocation, so, obligations regarding assurance of payment are "terms and conditions" of those activities Such terms and conditions must be "just," "reasonable" and "non-discriminatory." *See* 47 U S C §252(d)(2)(A) (intercarrier compensation must be "just and reasonable"); 47 U S C. § 251(c)(2)(D) (terms and conditions for interconnection must be "just, reasonable and non-discriminatory"), 47 U S.C § 251(c)(6) (same for collocation) Non-mutual assurance-of-payment rights cannot be squared with these substantive legal standards

Moreover, the fact that Cavalier's witness testified to its past actions in placing "embargos" on Verizon for nonpayment defeats any Verizon claim that it was somehow deprived of the opportunity to explore these issues on the record. *See* VZN Opp at 5-6. In this regard, Verizon argues that Cavalier is less at risk from Verizon's nonpayment than vice versa. *See id.* at 6. Common sense, however, shows that this is far from clear. Risk has two elements: the likelihood of something occurring, and the consequences if it does. Even assuming that it is more likely that Cavalier might fail to pay Verizon than vice versa, the firms' vastly different scale of operations means that the consequences to Verizon of Cavalier not paying are tiny compared to the consequences to Cavalier of Verizon not paying. There is no basis to assume, *a priori*, that Verizon, not Cavalier, is more in need of protection on this score.

Finally, Verizon quibbles with Cavalier's assertion that its assurance-of-payment rights should be "consistent" with the Commission's *Policy Statement*. VZN Opp. at 6. Verizon is correct that the *Policy Statement* was focused on assurance-of-payment practices by incumbents, *see id.*, doubtless because it was incumbents, not competitors, who were abusing the process. But Cavalier did not cite the *Policy Statement* for the proposition that its principles automatically apply to competitors. Cavalier cited it as an example of reasonable principles applicable to the issue of assurances of payment, that could reasonably be applied mutually. Again, Cavalier does not dispute that the ***reason*** the Commission acted was to rein in incumbents, not competitors.

Cavalier submits that Verizon is simply trying to protect a one-sided result in the Bureau's ruling that, in Cavalier's view, was adopted without full cognizance of the relevant evidence in the record. None of Verizon's arguments against mutuality on this issue have merit, however, and reconsideration should be granted.

3. VIOLATIONS OF THE COMMUNICATIONS ACT SHOULD BE EXCLUDED FROM THE LIMITATION OF LIABILITY CLAUSE.

Cavalier explained that the Communications Act provides a damages remedy to any person harmed by a carrier's violation of the Act (47 U.S.C. §§ 206-208); noted that the Commission itself had ruled that those provisions apply to an incumbent's violation of (at least some of) its obligations under 47 U.S.C. § 251(c) and associated interconnection agreements (the *CoreComm* cases), and that, therefore, it could not be consistent with the Act to require Cavalier -- potentially subject to damages arising from Verizon violations of the Act — to waive its right to recover those damages. Cavalier Petition at 7-9.

Verizon's objections to this conclusion are basically *non sequiturs*. *See* VZN Opp. at 8-10. It first points out that the *CoreComm* cases did not involve limitation of liability clauses, which is true but irrelevant. Those cases show that an incumbent's violation Section 251(c) can give rise to ***statutory,*** as well as merely ***contractual*** damages liability — the only proposition for which Cavalier relied on them. That legal fact necessarily poses the question of how an arbitrated interconnection agreement — that must, by law, be consistent with the statute — could reasonably ***limit*** the damages remedy that the statute expressly grants.

Note in this regard that the relevant statutory language is quite inimical to the notion of limiting damages liability to "direct" damages. Section 206 of the Act states:

> In case any common carrier shall do .. any act .. in this Act prohibited or declared to be unlawful, or shall omit to do any act ... in this Act required to be done, such common carrier ***shall be liable*** to the person or persons injured thereby ***for the full amount of damages sustained in consequence of*** any such violation of the provisions of this Act, [including costs and attorney's fees.]

47 U.S.C. § 206 (emphasis added). It is impossible to square an exclusion of "consequential" damages with an express statutory directive that the offending carrier be liable for the "full amount" of "damages sustained ***in consequence of***" a breach of statutory duties. When Verizon

objects to the potential for "unlimited" recovery of damages, therefore, Verizon is not really arguing with Cavalier, Verizon is arguing with Congress. *See* VZN Opp. at 8-9

Verizon makes several other meritless arguments. For instance, it notes that it disagrees with the holdings of the *CoreComm* cases. *See* VZN Opp at 8 & n.4. But this is a red herring. If Verizon is right, and the *CoreComm* cases were wrongly decided and are eventually set aside, then the scope of behavior for which Verizon would be liable for a violation of the Act will be narrower than if as Cavalier believes — the *CoreComm* cases are correct. But the issue is not what circumstances give rise to liability under the Act; it is what happens when such liability exists

Verizon also argues that limitations of liability (particularly, exclusions of consequential damages) are "customary and appropriate," VZN Opp at 8 & n.5, and wildly claims that "any service failure is arguably a violation of the Communications Act." *Id* at 7. One can question whether this industry "custom" is "appropriate" from a policy perspective.[6] But at bottom Verizon is confusing the terms and conditions applicable to a particular service with the requirements of the statute If an effective tariff says that a service is not guaranteed to be always available, it is hard to argue that it would violate either the tariff or the Act if the service were to fail from time to time Some service failures might violate the Act, others would not Again, this is a question of ***when*** and in ***what circumstances*** Verizon might be liable on the merits. It has nothing to do with limiting the scope of damages for the (likely quite small) set of simple service failures that might

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[6] *See, e g*. B A Cherry, THE CRISIS IN TELECOMMUNICATIONS CARRIER LIABILITY HISTORICAL REGULATORY FLAWS AND RECOMMENDED REFORM (Kluwer Academic Publishers 1999) Ms Cherry (now with the Commission's Office of Strategic Planning) noted as follows

> The traditional justifications .. for upholding limited liability tariff provisions suffer from logical inconsistencies and factual inaccuracies as well as foreshortened economic analysis The fallacies and myths of the traditional justifications need to be understood so that they no longer serve as barriers to policymakers' express consideration of appropriate liability rules for the telecommunications industry

Id at 116 In any event, "custom" or "tradition" cannot stand in the way of an express contrary statute.

be deemed to violate the Act, and certainly provides no grounds for limiting the scope of damages available for ***other***, and likely more serious violations of the Act [7]

Verizon, relying on an older Bureau order, claims that a state-administered "performance assurance plan" ("PAP") process provides meaningful financial consequences for failure to perform VZN Opp at 7. But Verizon ignores the fact that the decision relying on the PAP process was decided ***before*** the *CoreComm* cases, and so cannot be read to limit those cases Moreover, and more fundamentally, Verizon makes no effort to explain how the PAP process can fulfill the statutory command that, if a carrier has indeed violated the Act, the harmed party is entitled to "full" damages suffered "in consequence" of the violation.

Finally, it is interesting that Verizon would agree to exclude antitrust treble damages from the limitation of liability, while opposing an exclusion for simple damages under the Communications Act.[8] This shows that Verizon's purpose is to escape liability for violations of the Communications Act — the very law that this Commission is charged with enforcing

For these reasons, the Bureau should, as Cavalier requested, exempt violations of the Communications Act from any contractual limitations of liability.

4. VERIZON SHOULD PAY FOR VERIZON-CAUSED TRUCK ROLLS.

Cavalier showed that Verizon errors in loop provisioning make Cavalier dispatch

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The *CoreComm* cases themselves are instructive. In Maryland, Verizon unreasonably delayed providing interconnection facilities to CoreComm in violation of 47 U.S.C. § 251(c)(2), excluding CoreComm from the market. There is no reason such conduct should be subject to only limited liability Indeed, now that the Supreme Court has ruled that violations of Section 251(c) do not amount to antitrust violations, *see Verizon Communications, Inc v Law Offices of Curtis V. Trinko, LLP*, No. 02-682, 540 U S _ (Jan 13 2004), it is all the more important that statutory damages liability for such behavior be retained to provide a sound disincentive to ILECs contemplating such behavior

Note that the value of the contractual antitrust carve-out was eviscerated by the U S Supreme Court's January 20, 2004 denial of *certiorari* in *Cavalier Telephone, LLC v Verizon Virginia Inc*, Case No 03-271, which left intact the Fourth Circuit's rejection of antitrust liability putatively grounded in violations of the Communications Act

technicians unnecessarily. The Bureau held that this problem could be mitigated — not eliminated by Cavalier "participat[ing] in additional up-front testing at no charge." *MO&O* at ¶ 195. On reconsideration, Cavalier pointed out that this was fine as far as it goes, but would still leave some cases where Cavalier ends up having to dispatch its technicians due to Verizon's errors, and that there was no reason to expect Cavalier to absorb the costs of such truck rolls.

Verizon argues that Cavalier wants it to provide "perfect" services. VZN Opp. at 9-10. This is nonsense. It is not a violation of the contract (or the Act) for Verizon to make an honest mistake that makes Cavalier dispatch technicians. Nobody's perfect. But when this happens, ***someone*** — either Cavalier or Verizon — will have to bear the costs. There is no reason to lay these costs at Cavalier's feet, whether or not cooperative testing is effective at reducing the number of times the underlying errors occur. *Cf.* VZN Opp. at 10-11.

Verizon asserts that it is duplicative to require it to pay Cavalier when it forces Cavalier to dispatch technicians because its general performance on the matter of loop installation troubles is embraced by the PAP. VZN Opp. at 10 & n.9. But a general performance plan supporting accurate loop provisioning is not the same as keeping Cavalier whole for specific costs caused by Verizon's errors. There is nothing inappropriate about subjecting Verizon both to a general performance incentive plan and to liability for specific problems its errors cause.

Verizon also objects to Cavalier having noted that Verizon was not forthright in discussing its intentions regarding back-billing Cavalier for ***Verizon*** truck rolls in circumstances like those where Cavalier seeks to charge Verizon. Verizon claims to sees a distinction between charging Cavalier when a truck roll shows no problem relating to ***installation,*** and charging Cavalier when a truck roll shows no problem if the call related to ***maintenance*** — supposedly, according to Verizon, "an entirely separate category of charges." VZN Opp. at 11.

Cavalier, frankly, doesn't see it. We are dealing with the same loops and the same physical situation supposedly supporting the charge (dispatch followed by no problems found) Neither the Bureau's question to Verizon nor the testimony leading to it distinguished between "installation" and "maintenance." How Verizon in these circumstances finds the charges it ***did*** seek to bill Cavalier for are in "an entirely separate category" from the type of charges it said would not apply is, to put it mildly, obscure [9]

But even if Verizon somehow in good faith misunderstood this issue as it was discussed and litigated before the Bureau, the fact remains that Verizon asserts the right to charge Cavalier when Cavalier makes an error that imposes costs on Verizon, yet seeks to deny Cavalier the right to charge Verizon when Verizon makes an error that imposes costs on Cavalier. On the merits, this is unsustainable, and Cavalier's request for reconsideration should be granted on this point.

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[9] A brief review of the facts demolishes Verizon's effort to sidestep this issue Ms Webb testified that the term "truck roll" covers many service concerns, all involving an on-premise visit to find and fix the problem. Webb Testimony at p 4, lines 13-14 She explained that responsibility for initially getting service up and running falls on Verizon's "***repair***" organization, the RCMC; and that if a newly placed loop doesn't work, Cavalier contacts the Verizon "***repair***" organization, the same group that coordinates maintenance ' Her problem is that ***her*** organization wastes time having to coordinate ***repair*** with Verizon *Id* at p 6, lines 14-19, p 8, lines 14-15 And she noted that Verizon charges Cavalier for ***its*** truck rolls, but not vice-versa *Id* at p 9, lines 20-21 Ms Webb then produced Exhibit AW-5, a September 9, 2003 memo, where Verizon notifies Cavalier that it would back bill Cavalier for "dispatch", *i e* truck roll charges

Verizon's October 9, 2003 rebuttal testimony does not address the September 9 memo in any way It came up at the October 17, 2003 hearing The discussion was not limited to "installation" or maintenance," the question for Verizon was simply, "Verizon, can you just let us know if Virginia is going to be one of the states that's going to be included in back billing so Cavalier will have notice of that" And we'd like to know as well " Transcript at 646, lines 11-15 Verizon ducked this question in its *initial brief* In its reply brief, Verizon claimed the answer was "no," indicating that all "Dispatch" charges have already been billed About a month later, though, Cavalier received a series of back billing charges for "Dispatch", "Expedite", and other truck roll-related activities

The Bureau can assess for itself how relevant Verizon's lack of candor on this issue is to the matters pending on reconsideration But there can be no serious question that Verizon indeed was less than candid in its handling of this matter

5. CONCLUSION.

Cavalier respectfully requests that the Bureau reject Verizon's objections to Cavalier's Petition for Reconsideration and, instead, grant that Petition in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that true and accurate copies of the foregoing pleading were served on the following persons on January 29, 2004, by the methods indicated:

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